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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID TIMOTHY KUFFLER,

Defendant and Appellant.

F068966

(Super. Ct. No. CRF41281)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Kyle D. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald D. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Brook A. Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

David Timothy Kuffler appeals his felony conviction for bringing drugs into jail and his misdemeanor conviction for domestic battery. He was admitted to five years' probation for these offenses. He raises claims of instructional error, evidentiary error,

and ineffective assistance of counsel, all of which we reject. Kuffler also challenges two conditions of his grant of probation. He argues that a condition of probation specifying he abstain from excessive use of alcohol is unconstitutionally vague, and the people concede the point. We agree with the parties that this probation condition is void for vagueness and remand the matter for the trial court to consider whether it can fashion an appropriate and constitutionally valid restriction on Kuffler's use of alcohol during the period of probation. In addition, Kuffler contends the trial court erred in failing to specify the statutory basis of a \$1,070 fine imposed as a condition of probation. The People concede the court was required to specify the statutory basis of the fine but failed to do so. Accordingly, on remand, the court shall detail the amount of the fine and its statutory basis on the record. In all other respects, the judgment is affirmed.

### **FACTS AND PROCEDURAL HISTORY**

In the early morning hours of May 19, 2013, David Kuffler and Heather Bruehl, who had dated on and off for three years, had a late dinner at a restaurant at the Black Oak Casino in Tuolumne after having spent the previous day drinking. They left the casino at 2:00 a.m. because Kuffler, who was "really drunk," was asked to leave after having a dispute with a waiter over spilled ranch dressing. As they walked near the casino, Kuffler and Bruehl argued about the incident. Kuffler was yelling and being loud, and Bruehl was telling him to "get away." Finally, Bruehl felt like she needed to find a safe area to retreat to, so she walked to the Tuolumne City Post Office. Kuffler followed her; he was mad and pushed Bruehl to the ground. She "flew" and landed on her purse and broke her sunglasses, which were in the purse. Brittany Hoblitt, who lived in a house next to the post office, heard some "yelling" outside her house, mostly in a male voice; she described it as "just a lot of anger." As she looked out of her window, she saw Kuffler push Bruehl to the ground. Bruehl got up and started walking away; she told Kuffler to stay away from her. At that point, Hoblitt opened her door, took Bruehl into her house, and drove her home.

While Hoblitt was driving Bruehl home, Brian Richard Dumas, who was sleeping in Hoblitt's house, heard Kuffler in the bushes outside the house and called the police. Deputy Oliver Imlach of the Tuolumne County Sheriff's Office responded to the call; he arrested Kuffler for prowling and conducted a search incident to the arrest to check for any weapons on Kuffler's person. Sergeant Robin Hunt arrived to assist Imlach as he searched Kuffler. Hunt transported Kuffler to jail thereafter. Hunt testified that, on the way to the jail, he asked Kuffler whether he had any illegal items in his possession; Kuffler responded that he did not. Hunt repeated his question, warning Kuffler that if he were to bring anything illegal into the jail, he could be charged with a separate offense for doing so. Kuffler again denied he had any illegal item in his possession. Kuffler tried to talk further with Hunt but Hunt refused to engage in any conversation and turned the radio up in the patrol car.

During a subsequent search conducted when Kuffler was being booked into jail, 0.7 grams of marijuana were discovered in a small plastic container (about "one inch by one inch" or "half inch by half inch" in size) hidden in the waistband of his boxer shorts. Kuffler told Hunt that "Deputy Vasquez" had found the marijuana on his person during the earlier search but did not take it away. Hunt testified that a Deputy Vasquez was employed by the Tuolumne County Sheriff's Office but was not working that night. Hunt explained that Kuffler was familiar with Deputy Vasquez and had at least two prior substantive contacts with him. Kuffler testified he had confused Deputies Vasquez and Imlach and was actually referring to Deputy Imlach when he mentioned Deputy Vasquez.

On June 7, 2013, Kuffler was charged by information with bringing a controlled substance, marijuana, into jail (Pen. Code, § 4573), as well as misdemeanor domestic battery for pushing Bruehl to the ground (§ 243, subd. (e)(1)). A jury found Kuffler guilty of both counts after a two-day jury trial, reaching its verdict in about 45 minutes. The court suspended the imposition of sentence and placed Kuffler on probation for five

years. As conditions of probation, Kuffler was ordered to serve 90 days in county jail, abstain from the excessive use of alcohol, and pay a \$1,070 fine.

### **DISCUSSION**

#### ***I. The trial court properly declined to instruct the jury on self-defense***

Kuffler contends his due process right to present a complete defense to the charge of domestic battery was violated because the trial court did not instruct the jury on self-defense as he requested. We find the trial court did not err in declining to give a self-defense instruction because this instruction was not supported by substantial evidence. Further, because there was no error, there was no constitutional violation.

“A trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant’s theory of the case. [Citation.]” (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) Furthermore, a trial court may “properly refuse an instruction offered by the defendant if it ... is not supported by substantial evidence.” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021, quoting *People v. Moon* (2005) 37 Cal.4th 1, 30; *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055.) Substantial evidence is “evidence which is reasonable, credible, and of solid value” (*People v. Shelmire, supra*, at p. 1055, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578) and is “sufficient for a reasonable jury to find in favor of the defendant.” (*People v. Salas* (2006) 37 Cal.4th 967, 982, citing *Mathews v. United States* (1988) 485 U.S. 58, 63.) In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether “there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.” (*Salas, supra*, at p. 982, quoting *People v. Jones* (2003) 112 Cal.App.4th 341, 351.) On review, we independently determine whether substantial evidence existed to support the defense.

(*People v. Shelmire*, *supra*, at p. 1055; *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 806.)

The prosecution bears the burden of proving beyond a reasonable doubt that the defendant's use of force was not in lawful self-defense. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340-341.) The elements of self-defense are: (1) the defendant reasonably believed he was in imminent danger of suffering bodily injury or being touched unlawfully; (2) the defendant reasonably believed the immediate use of force was necessary to defend against that danger; and (3) the defendant used no more force than was reasonably necessary. (CALCRIM No. 3470; *People v. Clark* (2011) 201 Cal.App.4th 235, 250.) The right to self-defense includes the right to use reasonable force to resist any harmful or offensive touching. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335 [“[A]n offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances.”]; *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [“Any harmful or offensive touching constitutes an unlawful use of force or violence.”].) For the defense of self-defense to apply, “the defendant must *actually and reasonably* believe in the need to defend.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, *italics added*; accord, *People v. Lee* (2005) 131 Cal.App.4th 1413, 1427.)

Here, the trial court correctly determined that the record did not reveal substantial evidence to support giving a self-defense instruction. In response to specific questioning from defense counsel, Bruehl testified she did not touch Kuffler or grab him at any point before he pushed her. Hoblitt, who saw the entire incident from her window, also testified that Bruehl did not touch or grab Kuffler prior to being pushed. Rather, Hoblitt stated that Kuffler simply pushed Bruehl with two hands and she fell back. In contrast, Kuffler testified on direct examination that Bruehl was telling him to get away from her and momentarily (for “a second”) grabbed his shirt near the collar bone to pull him in, as she did when she wanted to kiss him. Kuffler explained that he “react[ed]” in the

moment and “pushed her with both hands, then immediately asked her if she needed help up” because he “was sorry” about his reaction. Kuffler’s testimony indicates that he considered his reaction to be unreasonable and immediately regretted it. Kuffler’s counsel directly asked him, “So when you pushed her, what was going through your mind?” Kuffler responded, “Why does she hate me? What have I done? I know we’re drunk, I know I got us kicked out because the waiter thought I was being rude, but I didn’t know why I was being hated on, because I love her.” Kuffler’s statement does not reflect a concern for his physical safety or a need to deflect or avoid an offensive or harmful touch by Bruehl. Rather, Kuffler’s statement suggests he reacted out of frustration that Bruehl was angry with him when, for his part, he loved her and wanted to make up with her.

On cross-examination, Kuffler testified he realized after the fact that Bruehl might have been trying to kiss him. At the time of the incident itself, he was drunk and the alcohol “mess[ed]” with his “anxiety issue,” so he reacted in the moment by pushing Bruehl. He repeated that he was “immediately filled with regret” at his reaction and realized he had “messed up.” In contrition, he tried to help Bruehl up and acquiesced to her request that he go away.

On redirect examination, Kuffler said that, when Bruehl grabbed him, he “wasn’t sure within the five-second frame if she was going to become violent,” but he “immediately realized” that his “instant reaction” to push her was not warranted. When his attorney again pressed him as to why specifically he pushed Bruehl, he said, “I really don’t recall. It was, like, an instant reaction.” Even when his attorney pointedly asked whether Kuffler thought Bruehl might turn violent, he responded, “In the moment, it was just a reaction. I don’t know.”

On recross-examination, Kuffler emphatically confirmed he did not push Bruehl because he actually thought she might attack him, telling the prosecutor when she asked

as much, “No. You’re not listening.” He clarified that “the instant reaction was, ‘Is she going to be violent?’ so I pushed her.”

These facts reveal the trial court correctly determined that a self-defense instruction was not supported by substantial evidence in the record. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1145 [court need not give requested jury instruction where “supporting evidence is minimal and insubstantial”].) At no point in his testimony did Kuffler say he actually believed he needed to defend himself from Bruehl’s momentary touch. Similarly, he did not testify that he found her touch offensive or that he did not want her to touch him again. Rather, Kuffler repeatedly testified he did not know why he pushed Bruehl, characterizing the push as an unreasonable reflexive action because of the emotions going through his head. At most, he fleetingly wondered whether Bruehl was “going to be violent,” but immediately concluded she was not and that he had “messed up” by pushing her. Thus, in Kuffler’s own assessment, the push was not warranted; rather, he regretted it and tried to make amends for it by offering to help Bruehl to her feet and leaving the area at her request. Under these facts, the trial court properly declined to instruct the jury on self-defense. Moreover, since there was no error, there was no violation of Kuffler’s constitutional rights.

Finally, even if we assume, *arguendo*, that the trial court’s refusal to instruct on self-defense was error, it was harmless under any standard. (See *People v. Salas, supra*, 37 Cal.4th at p. 984 [“We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense.”].) On the night in question, Kuffler was extremely drunk and was yelling at Bruehl and following her as she tried to get away from him. Both Bruehl and Hoblitt testified that Bruehl did not touch Kuffler before he pushed her to the ground, in direct contrast to Kuffler’s testimony that Bruehl grabbed his shirt as if she were going to kiss him. Despite this testimony, Kuffler repeatedly stated he did not know why he pushed Bruehl and that he reacted without thinking. Kuffler never testified that he actually and reasonably believed he had to defend himself from violent or

offensive actions on Bruehl's part. Given these facts, it is clear beyond a reasonable doubt that, had the jury been instructed on self-defense, it nonetheless would have reached the same result and found Kuffler guilty of misdemeanor battery. Thus, any error was harmless to Kuffler, even if we apply the more rigorous *Chapman* test. (*Chapman v. California* (1967) 386 U.S. 18, 24 [state must prove error harmless beyond a reasonable doubt].)

## ***II. The exclusion of Sergeant Hunt's statement to Kuffler was harmless***

Kuffler contends the trial court erroneously characterized as hearsay evidence and excluded a statement made by Sergeant Hunt to the effect of, "[d]on't even talk to me. Don't even talk to me. Shut the F up," when he was transporting Kuffler to jail in his patrol car. Kuffler argues that Hunt's statement constitutes words of direction, which are never hearsay, and that the court's erroneous exclusion of this statement as hearsay was prejudicial because it deprived him of the right to present a defense to the charge that he knowingly brought drugs into jail. More specifically, Kuffler argues the court's ruling denied him the opportunity to present the defenses of entrapment and "lack of opportunity to purge the drugs." He argues these defenses were applicable because Hunt's statement precluded him from informing Hunt about the marijuana, causing him to commit the crime.

We disagree with Kuffler's contentions because, even if we were to assume for the sake of argument that the court's exclusion of Hunt's statement as hearsay was erroneous, the error was harmless.

### ***A. Background***

On direct examination, Kuffler testified he tried to tell Hunt, when both were in Hunt's patrol car, about some toiletries Kuffler had left behind at the scene of his arrest, but Hunt refused to talk to him. The following exchange took place:

"When I tried to tell [Hunt], you know, about my stuff that they left behind and—that's all I could get out.

“Q [by Kuffler’s attorney]. What stuff that you left behind?

“A. I had a bag of Heather’s conditioner and shampoo that she bought that day. [¶] ... [¶]

“Q. Where did you leave them?

“A. I believe I left them in the alley.

“Q. In the alley, okay. And so Hunt returns to the car and you tell him about those items?

“A. I started telling him, and he’s all, ‘Don’t even talk to me. Don’t even talk to me. Shut the F up.’

“MS. KRIEG [the prosecutor]: I’m going to object, calls for hearsay. Motion to strike.

“THE COURT: Just a moment. [¶] I’m going to sustain the objection. The testimony attributed to—I can’t tell. Is this Officer Imlach or Sergeant Hunt?

“MS. KRIEG: Sergeant Hunt.

“THE COURT: That testimony will be stricken from the record and the jury will disregard that. [¶] Continue, Miss Gorman.

“MS. GORMAN: Q. So without telling me what was said ....

“A. Okay.

“Q. [Y]ou tried to talk to Sergeant Hunt?

“A. Yeah. Didn’t happen. Radio was turned up.

“Q. And was he stern with you?

“A. Pretty much.

“Q. And he used curse words?

“MS. KRIEG: Objection, relevance.

“THE WITNESS: Yes.

“THE COURT: Sustained.

“MS. GORMAN: Q. Did you attempt to talk to Sergeant Hunt during your drive to the jail?

“MS. KRIEG: Objection, asked and answered.

“THE COURT: I’ll let him answer. [¶] Go ahead.

“THE WITNESS: At first, I did. But he wouldn’t allow me to because he turned the radio up and told me to shut the F up.

“THE COURT: That was previously ordered stricken. I will order that stricken from the record. Jury will disregard the comment attributed to Sergeant Hunt. [¶] ... [¶]

“Q. At any point, did you try to notify any of the officers that you had this marijuana before you went into the jail?

“A. I wasn’t able to even talk. I couldn’t hear myself talk because the radio was up so loud, so no.”

On redirect examination, Kuffler again addressed the issue of not being able to talk to Hunt:

“Q [by Kuffler’s counsel]. Okay. When you are back at the car, did you ever hear anybody ask you if there is anything else on you that wasn’t found?

“A. I don’t remember anything like that.

“Q. Okay.

“A. I do remember asking if I could get my stuff and that I was going to try and talk about that. He wouldn’t let me talk. And he did turn the radio all the way up on the rock and roll station. I couldn’t even hear myself talk, and he told me to, ‘Shut the F. up.’

“MS. KRIEG: I’m going to object. Again, hearsay, lack of foundation; motion to strike.

“THE COURT: Sustained. [¶] I think I ruled on this before. The statement attributed to Sergeant Hunt just testified to by Mr. Kuffler will be stricken. Jury will disregard it.”

***B. Analysis***

Kuffler's contention that he was prejudiced by the court's ruling because it precluded him from presenting the defenses of "lack of opportunity to purge the drugs" and entrapment is not supported in the record. Kuffler did not seek to present either of these defenses at trial. Instead, he presented an alternative defense based on his testimony that he notified Deputy Imlach about the marijuana on his person when Imlach detained, handcuffed, and searched him. As part of this defense, Kuffler argued that, because he had told Imlach about the marijuana and remained handcuffed thereafter, he had no control over the marijuana at the time he was involuntarily brought to the jail. As explained below, this defense, if believed, would have negated one of the elements of the offense as set forth in the relevant jury instruction.

The jury was instructed pursuant to CALJIC No. 7.34.06 ("Bringing or Sending Illegal Controlled Substance Into Prison/Jail/Etc.")<sup>1</sup> regarding the drug charge (Pen. Code, § 4573), as follows:

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant entered a prohibited area, namely the Tuolumne County Jail.

"2. At the time the defendant exercised control over or the right to control an amount of the controlled substance.

"3. The defendant knew of the substance's presence;

"4. The defendant knew of the substance's nature or character as a controlled substance;

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<sup>1</sup>Although the court's written instructions and oral reading reflect that this instruction is based on CALCRIM No. 2748, the language is in fact drawn from CALJIC No. 7.34.06.

“5. The controlled substance was in an amount sufficient to be used as a controlled substance.”

At trial, Kuffler testified that, when Imlach initially detained and handcuffed him in the alley next to Hoblitt’s house, prior to Hunt’s arrival, he conducted a pat-down search of Kuffler to check for weapons. Kuffler explained that, during this search, Imlach felt along Kuffler’s waist and found a small, plastic container of marijuana that Kuffler had stuffed down the front of his shirt; Imlach asked Kuffler what it was, and Kuffler informed Imlach that it was marijuana that Kuffler used to treat his anxiety (“I told him it was my cannabis I use medicinally. I use for anxiety”).<sup>2</sup> According to Kuffler, although Imlach knew the plastic box contained marijuana, he made no effort to seize it. Kuffler added that Imlach searched him more thoroughly a little later, in Sergeant Hunt’s presence, before placing him in a patrol car to be transported to jail. During this search Kuffler pointed out his marijuana pipe, which was in his left pants pocket, and told Imlach, “There’s my proof. That is my marijuana, proof that I use medicinally.”

In closing, counsel argued that “[t]his case comes down to whether you believe that there is a reasonable possibility that Mr. Kuffler told the officers about the marijuana that he had. And if you think there is a reasonable possibility that he did that, then he’s not guilty.” With express reference to the second element of the offense, counsel stated, “if you are handcuffed and you have told the officer that you have [the marijuana] on you, and a [marijuana] pipe was also found [on you] and you told them about the pipe too, you don’t have control over that item anymore. You are in custody. You can’t move it, you can’t do anything with it. You have told the officers. The officers have constructive control over that. They’re the ones who can move it. They’re the ones who

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<sup>2</sup>Sergeant Hunt testified that, after he was alerted by the jail deputies about a suspect item in the waistband of Kuffler’s underwear, he retrieved the container of marijuana from the underwear. Kuffler denied that the marijuana was in his underwear; he testified that it was down the front of his shirt, above his belt.

can do something with it. And if they are notified, you do not have any intention to bring that into the jail.” Finally, counsel ended her closing argument as follows: “And like I said at the beginning, if you think it is a reasonable possibility that my client told them that he had this marijuana, then he’s not guilty of that.”

Counsel did not pursue entrapment or “lack of opportunity to purge the drugs” defenses based on Sergeant Hunt’s refusal to talk to Kuffler. In fact, Kuffler did not even testify that he wanted to or tried to tell Hunt he had marijuana on him but was prevented from doing so by Hunt. Kuffler had every opportunity to testify to this point because, although the trial court excluded Hunt’s statement (“Don’t even talk to me. Don’t even talk to me. Shut the F up”), Kuffler was permitted to state that Hunt would not allow him to talk and turned the radio “all the way up on the rock and roll station.” Indeed, Kuffler’s counsel specifically asked, “At any point, did you try to notify any of the officers that you had this marijuana before you went into the jail?” Kuffler did not say that he had tried or wanted to do so, but instead responded, “I wasn’t able to even talk. I couldn’t hear myself talk because the radio was up so loud, so no.” Furthermore, although the trial court excluded Hunt’s statement, Hunt acknowledged on the stand that he had refused to talk to Kuffler about events related to his arrest. Thus, there was a basis for counsel to argue that Hunt’s actions precluded Kuffler from telling him about the marijuana and, in turn, Kuffler was not completely deprived of the opportunity to present a defense related to Hunt’s actions. On the other hand, counsel could reasonably choose not to present such a defense in light of other evidence in the record.

It is clear from the record that Kuffler’s testimony about Hunt refusing to talk to him, making the “shut the F up” statement and turning up the radio, pertained to a completely different issue (i.e., some toiletries Kuffler was concerned about) and was unrelated to Kuffler’s marijuana possession. Kuffler testified that he was trying to tell Hunt he had left some toiletries behind at the scene of his arrest and wanted to retrieve them, but Hunt refused to talk to him and turned up the radio to drown him out.

Specifically, Kuffler testified: “I do remember asking if I could get my stuff and that I was going to try and talk about that. [Hunt] wouldn’t let me talk. And he did turn the radio all the way up on the rock and roll station. I couldn’t even hear myself talk, and he told me to, ‘Shut the F. up.’”

In addition, Kuffler testified that when Hunt questioned him about the marijuana upon seizing it at the jail, Kuffler told him that “Deputy Vasquez knew it was on me” but did not take it away.<sup>3</sup> Kuffler did not claim he was prevented from disclosing the presence of the marijuana to Hunt because Hunt told him to “shut the F up.” Indeed, Kuffler denied at trial that the marijuana was even in his underwear, instead insisting that it was in his shirt all along and that Deputy Imlach had found it and left it there.

Furthermore, any suggestion that Kuffler wanted to tell authorities about the marijuana but was precluded from doing so by Hunt’s statement is belied by the fact that Kuffler had no explanation for his failure to tell jail personnel about the marijuana before they began the booking search. He had the opportunity to explain this failure when asked on direct examination: “What about the jail deputies before they began to search you? Did you let them know about it?” Kuffler’s response was only that he was “nervous” about the “going to jail thing.”

Finally, Sergeant Hunt testified that when the decision to transport Kuffler to jail was made, Hunt specifically warned Kuffler that taking illegal items into the jail would result in separate charges. Hunt asked him, twice, whether he had any illegal items in his possession and both times Kuffler denied possession of any illegal items. Thus, the jury could reasonably believe that Kuffler not only had the opportunity to tell Hunt about the drugs and to purge himself of them, but he specifically denied he had drugs on him when given that chance. Similarly, the jury could reasonably have found that, far from

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<sup>3</sup>Kuffler testified that he knew both Deputies Vasquez and Imlach and “got [them] confused”; he was actually referring to Deputy Imlach.

entrapping Kuffler, Hunt gave him two opportunities to purge himself of the drugs but Kuffler failed to do so.<sup>4</sup> In sum, the admission of Hunt's statement, "Shut the F up," would have added very little to Kuffler's defense.

In light of the foregoing, even assuming the court erred in excluding Hunt's statement, the error is harmless under the *Watson* standard, which applies absent federal constitutional error. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) Here there was no constitutional error because it is clear that, in excluding Hunt's statement, the court did not completely deny Kuffler the opportunity to present a defense and thereby violate his due process rights. While "[t]he complete exclusion of defense evidence ... 'theoretically could rise to [the] level' [citation] of a due process violation[,] ... short of a total preclusion of defendant's ability to present a mitigating case to the trier of fact, no due process violation occurs[,] even '[i]f the trial court misstepped, '[and its] ruling was an error of law ... but [there was] only a rejection of some evidence concerning the defense.''" [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 452-453.) Since it is not reasonably probable the result of the proceeding would have been different absent the court's assumed error, any error was harmless.

### ***III. Evidence of Kuffler's encounter with Deputy Imlach at a motel***

Kuffler contends the trial court committed reversible error in admitting evidence of an encounter between Kuffler and Deputy Imlach that occurred at a motel well after the events underlying the instant charges. Kuffler argues the court erred in admitting this evidence because it was irrelevant to the issues in the case, it amounted to inadmissible character evidence, and it was unduly prejudicial. Assuming for the sake of argument that this evidence should not have been admitted for one or more of the reasons posited

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<sup>4</sup>Kuffler denied that Hunt asked him whether he had anything illegal on him or warned him that bringing illegal items into the jail would result in additional charges.

by Kuffler, its admission was harmless under the applicable *Watson* standard. (*People v. Watson*, *supra*, 46 Cal.2d at p. 837.)

**A. Background**

During a booking search conducted on Kuffler's arrival at Tuolumne County Jail, a container of marijuana was found in his underwear. At the time, Kuffler had explained that "Deputy Vasquez" knew about the marijuana but had left it on Kuffler's person. Subsequently, at trial, Kuffler clarified that he was actually referring to Deputy Imlach, whom he mistook for Deputy Vasquez. The prosecution sought to show that Kuffler knew both Deputies Vasquez and Imlach from prior contacts and would not easily have confused the two. It was in the context of discussing his prior contacts with Deputy Imlach that Kuffler mentioned he had seen Deputy Imlach a few days prior to the instant trial at a motel. The judge allowed the prosecution to question Kuffler, over defense objection, about what he was doing at the motel, among other details regarding the incident. The judge further allowed the prosecution to call Deputy Imlach and question him, over defense objection, about the particulars of why he was summoned to the motel. Kuffler now contends the court erred on several grounds in admitting extraneous details of the motel incident.

The relevant exchange between the prosecutor and Kuffler transpired as follows:

"Q [by the prosecutor]. So you testified that Deputy Imlach told you you could keep the marijuana.

"A. [by Kuffler]. I did not testify to that.

"Q. Okay. That is what you told Sergeant Hunt at the jail, actually. You said Detective Vasquez had already found the marijuana and told you you could keep it, right?

"A. No. I said Vasquez kept it on me.

"Q. Vasquez—so you said Vasquez kept it on you?

"A. Yeah, because I [mistook] Imlach for Vasquez

“Q. Okay. And when Sergeant Hunt told you, ‘Detective Vasquez isn’t even working today,’ or ‘these early morning hours,’ why then didn’t you say, ‘Oh, I meant Deputy Imlach’?”

“A. Because I didn’t know it was Imlach. I wasn’t sure. Considering I didn’t look at his name tag and thinking he was Vasquez, that’s—that’s how it went.

“Q. But you testified yesterday [on direct examination] that you do know who Deputy Imlach is—

“A. Yeah. Because—

“Q. —from prior contacts.

“A. It is because he contacted me at the motel right before this court date.

“Q. And—he did? What were you doing at the motel?

“MS. GORMAN [Kuffler’s counsel]: Objection, relevance.

“THE WITNESS: I was walk—

“THE COURT: I’m going to—I’m going to overrule it.

“MS. KRIEG [the prosecutor]: Q. What were you doing at the motel?

“A. I was walking up the highway and, you know—with my headphones in and stuff just singing, and then I took a break at the motel.

“Q. In fact, isn’t it true that you—the motel called the sheriff’s office because you were trying to get into rooms?

“MS. GORMAN: Objection, relevance.

“THE WITNESS: No.

“MS. KRIEG: Q. That is not true?

“A. That is not true.

“THE COURT: I’m going to overrule the objection.

“THE WITNESS: I was only looking for a cigarette. And there is an ashtray by their hole, so that is where I was.

“THE COURT: All right. [¶] Mr. Kuffler, when there is an objection from either attorney, you have to stop talking, okay?

“THE WITNESS: I’m sorry, Your Honor.

“THE COURT: Stop talking for a moment.

“THE WITNESS: All right.

“MS. GORMAN: Sorry, Your Honor. [¶] I objected to relevance, and you’re overruling that?

“THE COURT: I’m overruling it. The door was opened by Mr. Kuffler. I’m going to let Miss Krieg explore it—although don’t follow it too far, Miss Krieg.

“MS. KRIEG: Thank you, Your Honor.

“Q. So Deputy Imlach was not called to the motel because you were trying to get into locked motel rooms?

“A. I think that they called because they had a suspicion, but I was only looking for a cigarette and then taking a break.”

Subsequently, the prosecutor called Deputy Imlach in rebuttal. He testified as follows:

“Q. [By the prosecutor]. And about how many times would you say you have contacted Mr. Kuffler prior to the May 19th incident?

“A. [By Deputy Imlach]. Um, I can think of at least two incidents and several other calls, but I didn’t actually contact him because he ran off.

“Q. Okay. And then this incident that he mentioned, this recent contact that you had with him at the motel, can you tell me what that call was about and about when that was?

“MS. GORMAN: Objection, relevance.

“MS. KRIEG: The defendant opened the door.

“THE COURT: I’m going to allow it. [¶] Overruled.

“MS. KRIEG: Q. Approximately when was that?

“A. It was fairly recently. I would guess within the last month.

“Q. What was that call?

“A. It was down in Jamestown at—I believe it was the Country Inn, one of the motels there off of Highway 108 near Golf Links, and the management had called saying there was a person outside causing a disturbance and trying to get into rooms and they were scared of him.

“Q. And did you respond to that call?

“A. Yes.

“Q. And who did you locate?

“A. David Kuffler.

“Q. And do you believe that he was truthful with you that day?

“MS. GORMAN: Objection, speculation.

“THE COURT: I’m going to sustain that.

“MS. KRIEG: Okay.

“Q. What did Mr. Kuffler say when you contacted him?

“A. He said he was just sitting there taking a break, and that was—I mean, that was pretty much it. He tried to keep it real simple like that.

“Q. And in your investigation, did you determine that he, in fact, was prowling around the business?

“A. That was my belief after talking to the reporting party. They were very scared, and she told me—

“MS. GORMAN: Objection, hearsay.

“THE COURT: Sustained.

“MS. KRIEG: Q. So the reporting party was hotel management?

“A. Yes.

“Q. And they were very scared?

“A. Yes.

“Q. Did they identify Mr. Kuffler?

“A. Yes. He was still seated outside.

“Q. And I assume he wasn’t renting a room there?

“A. No.”

**B. Analysis**

Even if we assume for the sake of argument that the evidence of the details of the motel encounter between Imlach and Kuffler was improperly admitted for one or more of the reasons identified by Kuffler, the error is harmless.

We review “the trial court’s decision whether to admit evidence, including evidence of the commission of other crimes, for abuse of discretion. [Citation.]” (*People v. Harris* (2013) 57 Cal.4th 804, 841.) An erroneous exercise of discretion in the application of ordinary rules of evidence generally does not implicate the federal Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) “[T]he admission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair.” (*People v. Partida* (2005) 37 Cal.4th 428, 436.) Thus, absent federal constitutional error, the standard of prejudice for the erroneous admission or exclusion of evidence is the harmless-error test set forth in *People v. Watson, supra*, 46 Cal.2d at page 837. Under that standard, an error is harmless if it does not appear reasonably probable a result more favorable to the defendant would have been reached absent the error.<sup>5</sup>

Here, assuming the court erred in admitting the disputed evidence, the error was harmless as “it is not reasonably probable that a result more favorable to defendant would

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<sup>5</sup>Without citing binding authority, Kuffler argues the trial court’s alleged error resulted in a constitutional violation and should be reviewed under the “harmless beyond a reasonable doubt” standard set forth in *Chapman v. California, supra*, 386 U.S. at page 24. We are not persuaded that *Chapman* applies because Kuffler has not shown that the admission of the disputed evidence rendered the trial fundamentally unfair and thereby violated due process.

have resulted absent admission of this evidence.” (*People v. Welch* (1999) 20 Cal.4th 701, 749-750.) First, there was overwhelming evidence of Kuffler’s guilt as to both charges. With regard to the charge of bringing drugs into the jail, Kuffler admitted he had the marijuana on his person when he was processed into jail. Kuffler’s claim that Deputy Imlach had found the marijuana during his initial search was refuted by Imlach’s testimony that he did not find the marijuana on Kuffler when he searched him at the scene and that, even if he had, he would have confiscated it. Moreover, Sergeant Hunt testified that, before taking Kuffler to jail, he specifically asked Kuffler whether he had anything illegal on his person and warned Kuffler that he would face additional charges if he did not give up any illegal items, but Kuffler denied he had anything illegal on him. With regard to the battery on Bruehl, three witnesses (Hoblitt, Bruehl, and Kuffler) testified that Kuffler pushed Bruehl. In light of the strong evidence against Kuffler, it is reasonably probable the outcome would have been the same absent the assumed error on the part of the trial court.

Second, the questions and testimony about the motel incident were relatively brief and did not create significant potential for prejudice. Kuffler’s claim that the evidence about the motel incident established that Kuffler attempted to or actually did burglarize one or more motel rooms is inaccurate. The evidence did not suggest that Kuffler had committed a crime or that Deputy Imlach believed Kuffler had committed a crime. Rather, at most, it indicated that Deputy Imlach believed Kuffler was nosing around the motel in a disconcerting manner.

Finally, the jury was not instructed with CALCRIM No. 375 (“Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.”), which specifically addresses the jury’s consideration of evidence of uncharged offenses.

In light of these factors, even if we assume the trial court improperly admitted evidence of the motel incident, the error was harmless.<sup>6</sup>

#### ***IV. Ineffective-assistance-of-counsel issues***

Kuffler argues his counsel was ineffective for (1) failing to understand his defense; (2) failing adequately to “articulate why Deputy Imlach’s knowledge of the marijuana was important” and to “request jury instructions on the topic”; and (3) failing to argue that the prosecutor committed misconduct in several instances. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance “fell below an objective standard of reasonableness” under prevailing professional norms, and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see also *People v. Hester* (2000) 22 Cal.4th 290, 296.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland*, *supra*, at p. 694.) “Reviewing courts defer to counsel’s reasonable tactical

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<sup>6</sup>Kuffler argues the error is not harmless because its impact was exacerbated by the court’s instruction to the jury that it may consider, among a number of factors, “[other] conduct that reflects on [the defendant’s] believability.” (CALCRIM No. 226.) He contends the prosecution sought this instruction not only for the jury to be able to consider the possibility that Kuffler was acquainted with both Deputies Imlach and Vasquez and was making up a story about Deputy Vasquez allowing him to keep the marijuana, but also to permit its consideration of “an uncharged burglary allegation” based on the motel incident. Kuffler’s argument is unavailing because, unlike CALCRIM No. 375 (“Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.”), which specifically addresses evidence of uncharged offenses, CALCRIM No. 226 encompasses a wide range of factors bearing on the credibility of a witness and does not specifically mention character or other-crimes evidence. Moreover, the instruction did not reference the motel incident as a factor bearing on Kuffler’s credibility, nor did the prosecutor argue that the jury should consider the motel incident in assessing Kuffler’s credibility.

decisions in examining a claim of ineffective assistance of counsel [citation], and there is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

**A. *Counsel was not ineffective in failing to present a “no opportunity to purge the drugs” defense***

Kuffler argues that his counsel was ineffective in failing to “properly identify [his] primary defense to count one—that [he] had no opportunity to purge himself of the marijuana before reaching jail,” and to request a related instruction. Kuffler contends counsel should have presented a defense to the effect that Kuffler had no opportunity to purge himself of the hidden drugs once he was headed to jail because Sergeant Hunt refused conversation and turned up the radio to prevent it. Kuffler’s claim has no merit because the record does not show that Kuffler wanted to or sought to tell Hunt about the marijuana in his underwear but was rebuffed by Hunt. Kuffler never directly testified that he wanted to tell Hunt about the marijuana, but, rather, stated that Hunt told him to shut up when he attempted to talk to Hunt about retrieving some toiletries Kuffler had left behind at the scene of his arrest. Furthermore, when Kuffler was asked if he told the jail deputies about the marijuana before they searched him, he responded that he was “nervous” about “going to jail”; he did not say that he did not tell them about the marijuana because of Hunt’s directive not to talk to him. Indeed, when Hunt questioned Kuffler about the marijuana after its discovery, Kuffler responded that Deputy Vasquez, whom he later said he had confused with Imlach, knew about the marijuana but left it on Kuffler; again, Kuffler did not say he had kept quiet about the marijuana because of Hunt’s directive not to talk to him. Finally, Hunt testified that, when he was transporting Kuffler to jail, he warned Kuffler that bringing any illegal items into the jail would result in additional charges and twice asked him whether

he had any such items in his possession; both times Kuffler denied he had any illegal substance. Given the evidence in the record, counsel acted reasonably in opting not to present such a defense or request a jury instruction for it. Similarly, in light of the evidence in the record, Kuffler was not prejudiced by counsel's failure to present it.

***B. Counsel was not ineffective in failing to articulate the relevance of Deputy Imlach's alleged knowledge that Kuffler had marijuana***

Kuffler argues his counsel was ineffective because she "failed to articulate why Deputy Imlach's knowledge of the marijuana was important, and failed to request jury instructions on the topic."<sup>7</sup> He contends that, although counsel argued Imlach knew about the marijuana, counsel did not elucidate how this fact negated any of the elements of the offense set forth in the applicable jury instruction. Indeed, Kuffler argues that the fact Imlach knew about the marijuana had no significance under the instruction actually given to the jury, thereby depriving Kuffler of any defense to the drug charge. He argues counsel should have requested a specific "instruction on officer knowledge" so as to present a coherent defense to the drug charge. Kuffler's claim that counsel was ineffective on these grounds has no merit.

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<sup>7</sup>Kuffler testified that, when Deputy Imlach first detained him, he handcuffed Kuffler and patted him down for weapons; during the pat-down search, Imlach felt a little plastic container along Kuffler's waist, in which Kuffler had stored marijuana. Kuffler stated that Imlach asked him what it was, and Kuffler told him it was cannabis that he used to treat his anxiety. Kuffler explained he was wearing a t-shirt that was snugly tucked into his pants with an untucked plaid shirt over it, and he had put the container of marijuana down his t-shirt. Kuffler further testified that Imlach then led him to a patrol car and did a more thorough search, during which Kuffler pointed out his marijuana pipe to Imlach. Kuffler testified he told Imlach, "There's my proof. That is my marijuana, proof that I use medicinally."

As to the drug charge under Penal Code section 4573, the jury was instructed pursuant to CALJIC No. 7.34.06 (“Bringing or Sending Illegal Controlled Substance Into Prison/Jail/Etc.”)<sup>8</sup> as follows:

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant entered a prohibited area, namely the Tuolumne County Jail.

“2. At the time the defendant exercised control over or the right to control an amount of the controlled substance.

“3. The defendant knew of the substance’s presence;

“4. The defendant knew of the substance’s nature or character as a controlled substance;

“5. The controlled substance was in an amount sufficient to be used as a controlled substance.”

Counsel began her closing argument with a reference to Imlach’s knowledge of the marijuana: “This case comes down to whether you believe that there is a reasonable possibility that Mr. Kuffler told the officers about the marijuana that he had. And if you think there is a reasonable possibility that he did that, then he’s not guilty.” Counsel continued that Kuffler was not guilty of bringing drugs into jail because he told the officers about the marijuana at the time he was arrested. Counsel argued that Kuffler told the officers about the marijuana when he was handcuffed and in a situation where he could not remove the marijuana even if he wanted to, thus relinquishing control over the marijuana and the right to control the marijuana to the officers. With express reference to the second element of the offense, counsel stated, “if you are handcuffed and you have told the officer that you have [the marijuana] on you, and a [marijuana] pipe was also found [on you] and you told them about the pipe too, you don’t have control over that

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<sup>8</sup>See footnote 1, *ante*, page 11.

item anymore. You are in custody. You can't move it, you can't do anything with it. You have told the officers. The officers have constructive control over that. They're the ones who can move it. They're the ones who can do something with it. And if they are notified, you do not have any intention to bring that into the jail." Finally, counsel ended her closing argument as follows: "And like I said at the beginning, if you think it is a reasonable possibility that my client told them that he had this marijuana, then he's not guilty of that."

Counsel clearly articulated that whether Kuffler had informed Imlach about the presence of marijuana on his person was a critical factor in determining his guilt or innocence. Counsel further argued Kuffler had notified Imlach about the marijuana and therefore effectively had yielded control over the marijuana to Imlach, as Kuffler himself was handcuffed at the time and remained so until he was brought into the jail. Counsel contended the second element of the offense as delineated in the relevant jury instruction, i.e., that defendant must have exerted control over the controlled substance when it was brought into the jail, was not satisfied given Kuffler's testimony that he had told Imlach about the marijuana on his person and himself was handcuffed the entire time. In light of the second element of the offense as specified in the relevant jury instruction and counsel's argument in relation to this element, a special instruction on Imlach's putative knowledge of the marijuana was not necessary. In turn, counsel's performance was not deficient in terms of mounting a defense based on Kuffler's testimony that he had notified Imlach about the marijuana, and Kuffler was not prejudiced by counsel's purported failure to so.

***C. Counsel was not ineffective in failing to raise issues of prosecutorial misconduct***

Kuffler contends his counsel was ineffective in failing to argue that the prosecutor committed misconduct in attempting to create an impression and have the jury infer that

Kuffler was “a despicable person” and was therefore guilty of the charged crimes. We disagree.

The standards governing review of misconduct claims are well settled. “A prosecutor’s conduct violates the federal Constitution when it “infects the trial with such unfairness as to make the conviction a denial of due process.” [Citations.]” (*People v. Hinton* (2006) 37 Cal.4th 839, 862.) ““Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” [Citation.]” (*Id.* at p. 863.)

“To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) “In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]” (*Frye, supra*, at p. 970.)

Finally, “[a] defendant’s conviction will not be reversed for prosecutorial misconduct ... unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]” (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Kuffler argues the prosecutor committed misconduct when she asked him during cross-examination why he tried to intimidate Bruehl before she testified in the case. The backdrop to this question was that the victim-witness advocate had informed the prosecutor that Kuffler had called Bruehl a liar when he passed her in the hall immediately before the trial commenced. The prosecutor reported to the court, outside the presence of the jury, that the victim felt “very intimidated” by Kuffler. The court instructed defense counsel to direct Kuffler not to have any contact with Bruehl.

Subsequently, on cross-examination, Kuffler testified he had contacted Bruehl the previous night and she told him she felt she was being forced to testify against him. He further stated he had told Bruehl the same morning, before trial, that his father is a correctional officer and is not a liar. The prosecutor then asked him why he would try to intimidate Bruehl in this way. Kuffler responded that he was not trying to intimidate her. At that point, defense counsel objected that the question was argumentative and the judge sustained the objection.

In light of Kuffler's testimony that Bruehl felt she was being forced to testify against him and the information from the victim-witness advocate that Bruehl felt intimidated by Kuffler's comments to her in the hallway outside the courtroom, the prosecutor's question was not deceptive or reprehensible, nor did it render the trial fundamentally unfair. Accordingly, defense counsel was not ineffective in objecting to it as being argumentative rather than on grounds that it constituted prosecutorial misconduct. Kuffler also suffered no prejudice, since defense counsel's objection on the alternate grounds was sustained and the prosecutor's conduct did not constitute misconduct. Both prior to the start of testimony and at the conclusion of the case, the court instructed the jury that the attorneys' questions were not evidence and that the jury was required to ignore any question as to which an objection was sustained. It is presumed the jury understood and followed these instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Finally, the evidence in the case was overwhelming, and Kuffler has not shown that the results of the proceedings would have been different absent the prosecutor's question.

Kuffler next argues the prosecutor committed misconduct during cross-examination by "accus[ing] [Kuffler] of breaking into a local business on the night of the incident, without any basis [in] the record to believe that he did." Kuffler's contention is not supported by the record and is without merit.

In the relevant exchange, Kuffler explained he was stumbling around, “blausiated” or drunk, near Hoblitt’s house after knocking on the door and asking Brian Richard Dumas about Bruehl’s whereabouts, when he started going down an alley between the house and a neighboring business. Kuffler continued as follows: “Well, then I turned around and I saw the sheriff go by. And I knew I’d been drinking so, you know. I saw that fence by that business and I opened—it was open, had no lock on it, so I just opened it and I, you know, went in there and stood there.” The prosecutor then asked, “So you thought it would be good to go into a closed business at 3:30 in the morning ... to hide from the sheriff?” Kuffler responded, “I didn’t go into the business. I just opened the fence and stood right there. Because I was on my way home at that point, but I didn’t want to get arrested for another drunk in public because I already have two.” The prosecutor then moved on to questions on a different topic.

As clear from the above exchange, the prosecutor did not accuse Kuffler of “breaking into a local business on the night of the incident,” and her question did not constitute misconduct. Accordingly, Kuffler’s counsel was not deficient in failing to object to the prosecutor’s question on misconduct grounds, and there was no prejudice to Kuffler from her failure to object.

Kuffler next argues the prosecutor committed misconduct because she asked him about his recent contact with Deputy Imlach at a local motel (as discussed above) and called Imlach in rebuttal to impeach Kuffler’s testimony about the motel incident. However, it was Kuffler who broached the topic of the motel incident, and the prosecutor’s follow-up questions were not deceptive or reprehensible to the level of constituting prosecutorial misconduct. Furthermore, defense counsel repeatedly objected to the questions on relevance grounds but the court overruled her objections. Defense counsel’s performance in this regard was not deficient, and Kuffler has not shown that he was prejudiced by her failure to object on misconduct grounds.

Finally, Kuffler claims his counsel was ineffective for failing to object on misconduct grounds when the prosecutor, in one instance, asked Kuffler whether Bruehl was lying, and in another instance, whether Sergeant Hunt was lying. These contentions have no merit.

Kuffler had testified that, in the hours before his arrest, when he and Bruehl were lying around drinking in a field, his marijuana container fell out of his pants pocket a couple of times, so he put it down the front of his shirt. Kuffler's testimony prompted the prosecutor to remind Kuffler that Bruehl testified she did not know he had marijuana on him that day. Kuffler responded, "Oh, she knew." The prosecutor then asked, "So she's lying?" Kuffler answered that he had smoked marijuana in front of Bruehl the previous night. The prosecutor objected to the answer as nonresponsive; the court sustained the objection. The prosecutor recounted that Bruehl's testimony was that she knew Kuffler smoked marijuana but did not know he had it on him on the day of his arrest. The prosecutor then asked, "Was she lying?" Kuffler answered, "She might have not been aware." The prosecutor responded, "It is a yes or no." Kuffler said, "Yes."

The propriety of "were they lying" questions was addressed by the California Supreme Court in *People v. Chatman* (2006) 38 Cal.4th 344. In *Chatman*, the prosecutor repeatedly asked the defendant whether certain witnesses were lying and whether they had a reason to lie. (*Id.* at pp. 378-379.) The *Chatman* defendant argued "the questions 'invaded the province of the jury,' elicited improper lay opinion about the veracity of witnesses, and constituted misconduct by intentionally eliciting inadmissible testimony." (*Id.* at p. 379.) In rejecting the defendant's arguments, our Supreme Court held that "were they lying" questions are "legitimate inquiry" if they call for testimony that would properly help the jury to determine credibility. (*Id.* at p. 383.) A defendant's testimony may assist a jury because a "defendant who is a percipient witness to the events at issue" or who "knows the other witnesses well" may "be able to provide insight on whether witnesses ... are intentionally lying or are merely mistaken." (*Id.* at p. 382.)

Here, Kuffler's testimony that Bruehl knew he had marijuana on him on the day of his arrest ("Oh, she knew") directly suggested that Bruehl had lied under oath. Since Kuffler was a percipient witness to the events at issue and knew Bruehl well, he was in a position to address whether Bruehl was confused or mistaken or intentionally lying. Therefore, the prosecutor's question did not constitute misconduct, and counsel was not deficient in failing to object on grounds of misconduct. Furthermore, there was no prejudice to Kuffler as the question was not reprehensible, the evidence against him was overwhelming, and the jury was instructed that attorneys' questions were not evidence.

As for the exchange regarding Sergeant Hunt, Kuffler denied that Hunt had warned him against bringing illegal items into the jail, prompting the prosecutor to ask whether Hunt was lying when he testified to the contrary. Defense counsel objected to the question on unspecified grounds, the court sustained the objection, and the prosecutor rephrased the question to the court's and counsel's satisfaction. The prosecutor's question did not lead to "unfairness as to make the resulting conviction a denial of due process" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181) or amount to a deceptive or reprehensible ploy to persuade the jury. (*People v. Frye, supra*, 18 Cal.4th at p. 969.) Rather, the question was within reasonable bounds because Kuffler, who directly interacted with Hunt and would have personal knowledge of the matter the question addressed, could provide insight as to Hunt's credibility on this issue.

Accordingly, defense counsel was not deficient in failing to object on misconduct grounds. Kuffler also has not established prejudice given there was no misconduct, the prosecutor immediately rephrased the question upon objection, and the evidence against Kuffler was overwhelming.

**V. *A probation condition prohibiting the "excessive use of alcohol" is unconstitutionally vague***

In admitting Kuffler to probation for five years, the court ordered as a condition of probation that Kuffler "[a]bstain from the excessive use of alcohol." Kuffler argues this

condition of probation is, on its face, unconstitutionally vague. The vagueness doctrine invalidates a condition of probation that is “““so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’ [Citations.]””” (In re Sheena K. (2007) 40 Cal.4th 875, 890.) The People concede the point. Accordingly, we find this probation condition to be void for vagueness and remand the matter for the trial court to consider whether it can fashion an appropriate, constitutionally valid restriction on Kuffler’s use of alcohol during his term of probation.

**VI. *The trial court must clarify the statutory basis of the \$1,070 fine imposed as a condition of probation***

In sentencing Kuffler, the court adopted the recommendation of the probation department to admit Kuffler to probation for five years. The court also adopted the condition of probation recommended by the probation department that Kuffler pay a \$1,070 fine, including the fine in its order granting probation. At sentencing, the court stated as follows:

“Be the further judgment and sentence of the Court that the imposition of sentence will be suspended, and defendant will be admitted to probation for five years on the terms and conditions set forth in the order granting probation that—which Mr. Kuffler has accepted by his signature on the order granting probation.

“With respect to Condition Number 22, be the order of the Court that the defendant will serve 90 days in county jail with credit for time served of three days.”

Although the court did not recite all the conditions of probation on the record, it clearly referenced its written order granting probation, which included the \$1,070 fine. Specifically, the order granting probation states that Kuffler shall “[p]ay a fine of \$1070.00, including penalty assessment payable to the Office of Revenue Recovery at a rate and time to be determined by the Office of Revenue Recovery.”

Kuffler now argues that, “[b]ecause [the \$1,070] fine conflicts with the trial court’s oral pronouncement of judgment, it is a clerical error that must be stricken. Even

if it is not deemed in conflict with the Reporter’s Transcript, however, it should be stricken anyway because it failed to assert a statutory basis.”

The People explain that the fine and the court’s oral pronouncement are not in conflict because the trial court ordered that Kuffler “be admitted to probation for five years on the terms and conditions set forth in the order granting probation,” and the order granting probation included the \$1,070 fine. However, the People concede that “the court’s oral pronouncement and [order granting probation] do not provide statutory bases for the \$1,070 fine,” and that, therefore, “the matter should be remanded for the court to detail the statutory basis for [the] fine.”

Accordingly, we remand the matter for the trial court to detail the amount of the fine and its statutory basis on the record. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1200; *People v. Hamed* (2013) 221 Cal.App.4th 928, 939-940.)

**DISPOSITION**

The probation condition that Kuffler abstain from excessive use of alcohol is stricken. The matter is remanded to the trial court to consider whether it can fashion an appropriate and constitutionally valid restriction on Kuffler’s use of alcohol for the probationary period. The trial court is also directed on remand to state on the record the statutory basis of the \$1,070 fine imposed as a condition of probation. The judgment is affirmed in all other respects.

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Smith, J.

WE CONCUR:

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Kane, Acting P.J.

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Poochigian, J.